

**Pittsburgh Mailers Union Local No. 22, affiliated with the Printing, Publishing and Media Workers Sector, Communications Workers of America, AFL-CIO-CLC and Pittsburgh Press Company. Case 6-CB-8006**

August 27, 1991

**DECISION AND ORDER**

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The complaint alleged and the judge found<sup>1</sup> that the Union violated Section 8(b)(1)(A) by charging a referral fee to part-time mailroom employees of the Company who had obtained their employment without any action by the Union. The Union excepts, arguing that under the parties' contractual arrangement it operates an exclusive referral system and that therefore the fee is lawful. We find merit in the Union's exceptions and we reverse.

The facts are not in dispute. The Company publishes a newspaper and is a party to a collective-bargaining agreement with the Union covering a unit of mailroom employees. In 1988, the parties executed a memorandum of understanding (the Memorandum) providing that, under certain circumstances, the Company may use a new classification of mailroom employee, the part-time/temporary employee (part-timers). Under the Memorandum's terms, these employees are excluded from coverage under the parties' contract. The Company has employed part-timers under the terms of the Memorandum at its North Side mailroom since August 1, 1989.

Among other conditions, the Memorandum sets out a procedure for securing the services of part-timers. Under it, the Company takes applications from prospective part-timers, recruited either from sources of its own or from a list provided by the Union, screens, interviews, and tests the applicants, and, if satisfied, places their names on a part-timer list. The Memorandum requires that the list "will be comprised of 50 percent [Union] nominated and 50 percent [Company] nominated individuals."

Under the Memorandum, the Company formulates and updates the part-timer list. Each week, the mailroom superintendent gives an updated list to an elected union representative who is also a company employee or, when no elected representative is available, to a mailroom employee. The Union's designee then telephones "such number of part-timers on a rotation basis

from the list as may be required by the [Company]."<sup>2</sup> Beginning with the first name on the list, the caller telephones each person listed, in order, until the required number of part-timers have agreed to work. The next caller begins where the last caller left off. When the last person has been called, the caller returns to the top of the list and goes through it again. The caller notes on the list the shifts for which part-timers are needed, the time of each call, and the response. Since August 1, 1989, the Union has required part-timers to pay a fee of \$2 for each call that results in a shift worked.

The judge found that the requiring of payment of the fee violates Section (b)(1)(A). He noted that the Act prohibits a union from charging and collecting a referral fee as a condition of employment from newly hired employees who do not gain employment through efforts extended by the Union. Citing *Detroit Mailers Local 40 (Detroit Newspaper)*, 192 NLRB 951, 962 (1971), the judge reasoned that the Union in this case does not assist in hiring part-timers and thus does not provide a referral service; instead, he found that the Union acts as a mere conduit in scheduling them for work. Hence, under the judge's reading of *Detroit Mailers*, the Union is not entitled to charge the part-timers a fee. In its exceptions, the Union argues that the judge has misread *Detroit Mailers* and that the fee is lawful because the Union controls the part-timers' access to part-time temporary employment in the Employer's mailroom. As noted above, we find that, under the parties' agreement and practice, the Union is providing a referral service to employees and that its charging a fee for successful referrals does not in itself violate the Act.<sup>3</sup>

It is well settled that a union's operation of a hiring hall or referral system does not violate the Act. *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 674 (1961). Moreover, a union is free to charge individuals referred for employment a fee reasonably related to the value of the service provided. *NLRB v. Operating Engineers Local 138*, 385 F.2d 874, 876 (2d Cir. 1967).

Under a hiring hall agreement, the employer and the union agree to "route" a classification of employees through the union. *Teamsters Local 357*, supra at 676. Historically, such arrangements grew out of the classic "hiring hall," an actual location serving "as a crossroads where the pool of employees converges in search of employment and the various employers' needs meet

<sup>1</sup> On January 11, 1991, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Company each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

<sup>2</sup> The Memorandum further provides that the Company may bring suspected abuses of the call-in system to the Union's attention. If the Union fails to correct the abuse, the Company may assume the responsibility for calling the part-timers.

<sup>3</sup> We agree with the Union that the judge misapplied *Detroit Mailers Local 40*, supra. In that case, the judge found a violation based on the union's concession that it had charged a referral fee to individuals who had gotten work from the employer through other means and that by so doing it had violated Sec. 8(b)(1)(A). See id. at 962.

that confluence.”<sup>4</sup> The Board has, however, recognized that other types of “routing” arrangements also constitute exclusive referral systems<sup>5</sup> and that, as a practical matter, such systems can exist where, as here, an employer takes part in the process of locating and screening employees.<sup>6</sup> In this case, the Company and Union have agreed that the Company will “route” its requirements for part-time/temporary employees through the Union and that the Union will bear the responsibility of contacting individuals so that the Company’s needs are met. Unquestionably, the Union does not perform *all* services connected with filling the part-time temporary slots. It does not follow, however, that the Union therefore performs *no* services.<sup>7</sup> As it is clear that under the parties’ agreement and practice part-timers obtain work through efforts expended by the Respondent and that they cannot obtain part-time temporary mailroom work with the Company through means other than this bargained-for arrangement, we cannot find that the Union is collecting a referral fee from employees who gained employment without any efforts by the Union.<sup>8</sup> Accordingly, we dismiss the complaint.

<sup>4</sup> *Mountain Pacific Chapter, AGC*, 119 NLRB 883, 896 fn. 8 (1957), enf. denied in part 306 F.2d 34 (9th Cir. 1962), overruled, *Teamsters Local 357*, supra.

<sup>5</sup> See, e.g., *Toledo World Terminals*, 289 NLRB 670, 671–673 (1988) (union operates hiring hall when steward, on employer’s premises, reads out names of workers until employer’s needs are filled); *Plumbers Local 17*, 224 NLRB 1262 (1976), enf. 575 F.2d 585 (6th Cir. 1978) (hiring hall found where union kept a “loafing” list, which it read to employers over the telephone).

<sup>6</sup> See, e.g., *Morrison-Knudsen Co.*, supra, 291 NLRB 250, 258 (1988); *Operating Engineers Local 513 (McFry Excavating)*, 197 NLRB 1046, 1047 (1972) (exclusive hiring hall exists where top two categories for referral consist of employees who have previously worked for the employer and, additionally, employers are permitted to request up to 50 percent of other referrals by name). *Detroit Mailers Local 40*, supra at 959 (casuals list in exclusive referral system consisted in large part of employees whose names were submitted by employer).

<sup>7</sup> In this respect, this case is distinguishable from *Teamsters Local 667 (Spector Freight)*, 248 NLRB 260, 261 (1980), in which the union bargained with a multiemployer group for a referral system but, as the Board found, the parties had not maintained one. In that case, the union essentially washed its hands of the referral process by turning its miscellaneous list over to employers and permitting them to make all contacts with employees.

<sup>8</sup> The Company argues in support of the judge’s reasoning that the Union cannot lawfully charge a fee because, when it calls an individual on the list, the Company has already “hired” that individual; thus, no “referral” and no “hiring” occur. Under the facts here, this argument is a distinction without a difference, because the end result of the Company’s hiring process, as applied to part-timers, is not regular employment but placement on what is essentially a referral list. In practical terms, the issue here is whether the Union has performed an act that matches a job or shift opening with an individual willing to perform the work. The answer, in our view, is yes. The decisive factor in this case is not whether the Company has retained or relinquished the right to nominate or screen potential part-timers, or even at what point in the process it exercises these rights, but rather that under the parties’ system, a person available for work and an employer with work to be performed are brought together through the services of the Union. Of course, we do not pass on the magnitude of the Union’s efforts or the relationship between its services and the fee charged for them. These issues are not before us. We simply conclude that the Union is not precluded by the nature of its arrangement with the Company from charging a reasonable fee for a call resulting in a shift worked.

## ORDER

The complaint is dismissed.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would adopt the judge’s decision finding that the Respondent has exacted a referral fee from the Employer’s part-time employees to which it was not entitled, and has thereby violated Section 8(b)(1)(A) of the Act.

Here, the Company contacts applicants for employment, screens them, interviews them, requires that they complete the Company’s application, and thereafter hires those who meet its requirements. Other than providing names and phone numbers of applicants for the list of part-timers, the Respondent plays no part in the hiring process. Even at that, if the Respondent were charging individuals a referral fee for providing their names and phone numbers to the Company as *applicants for employment* there would be no quarrel here. But that is not what is involved in this case. Rather, *after* the part-time employees have been hired, the Employer formulates and updates its part-time employee list, from which such number of part-timers are called each week on a rotation basis as the Company decides is necessary for staffing. Each week, the Company’s mailing room superintendent gives an updated call-in list to an employee in the mailing room, who usually (though not always) is one of the Respondent’s elected representatives. That individual uses the list, on instructions from the superintendent, to schedule part-timers for work by making calls in rotation, noting the time of the call and the response, calling each person until the required number of part-timers has agreed to fill the designated shift. On the next occasion, the caller starts with the next name on the list.

In short, a company employee, who may or may not be a representative of the Respondent, takes the Company’s prepared list and, on company time using company facilities, makes calls to those on the list in the order mandated by the Company.

I agree with the judge that, to the extent the Union fulfills any role at all in this scenario, it is merely acting as a conduit in the process of scheduling part-timers (whom the Respondent does not represent) for work in the Company’s mailroom. The Respondent does not provide a referral service to the part-timers in this context (as opposed to providing names at the preliminary stage of the Company’s hiring process).

In my view, this is not a legitimate hiring hall. I would affirm the judge’s decision, and I dissent from my colleagues’ failure to do so.

*Julie Stern, Esq.*, for the General Counsel.

*Richard Rosenblatt, Esq.*, of Englewood, Colorado, and *Marianne Olnier, Esq. (Gilardi & Cooper)*, of Pittsburgh, Pennsylvania, for the Respondent.

*John H.M. Fenix, Esq. (Baker & Hostetler)*, of Cleveland, Ohio, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Pittsburgh, Pennsylvania, on May 17, 1990. The charge was filed on September 21, 1989, and the complaint was issued on December 14, 1989. The complaint alleged that since on or about August 1, 1989, the Respondent, Pittsburgh Mailers Union, Local No. 22, affiliated with the Printing, Publishing and Media Workers Sector, Communications Workers of America, AFL-CIO-CLC,<sup>1</sup> had been charging a referral fee to part-time mailroom employees of the Pittsburgh Press Company (the Company), who had obtained their employment without any action by the Respondent. In its timely answer, the Respondent denied that it had committed the alleged unfair labor practice.

Upon careful consideration of the entire record, including the testimony of the witnesses and the exhibits received in evidence, and after reading and considering the posttrial briefs received from the General Counsel,<sup>2</sup> Respondent, and the Company, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

At all times material to this case, the Company, a Pennsylvania corporation, with an office and place of business in Pittsburgh, Pennsylvania, has published, circulated, and distributed a daily newspaper, the Pittsburgh Press, in the Pittsburgh, Pennsylvania area. During the 12 months ending on August 31, 1989, the Company, in the course and conduct of these business operations, realized gross revenues exceeding \$200,000, held membership in, or subscribed to, various interstate news services, including the Associated Press; published various nationally syndicated features, including Dear Abby; and advertised various nationally sold products including automobiles produced by General Motors. Upon the foregoing data, I find, and the Respondent admitted, that the Company is, and has been at all times material to this case, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admitted, and I find, that at all times material to this case, it has been a labor organization within the meaning of Section 2(5) of the Act.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

At all times material to this case, the Respondent and the Company have been parties to a collective-bargaining agreement covering a unit of the latter's mailroom employees. The Company employs bargaining unit mailroom employees at its North Side facility and at its downtown operation. The Company's mailroom employees at the downtown facility participate in the movement of newspapers from the presses to the trucks for distribution. The unit mailroom employees at the North Side facility insert advertising supplements into the

comic packages for distribution on Sunday, and also insert advertising into the Company's daily newspapers.

On February 12, 1988, the Respondent and the Company executed a memorandum of understanding (the Memorandum), which included provision for a new classification of mailroom employee. The Memorandum expressly excluded the new classification, part-time/temporary, referred to in the Memorandum as "part-timers," from coverage by the collective-bargaining agreement between the Respondent and the Company. The Company has employed part-timers at its North Side mailroom operations since August 1, 1989.

The Memorandum prescribes the same procedure for hiring the part-timers as the Company uses for hiring its other employees. The Company recruits prospective part-timers on its own or from a list which the Respondent provided. The Company screens and interviews the prospective employees. At the time of the interview, the Company requires that they fill out an application for employment and other forms. Successful applicants undergo a physical examination, which the Company provides. Upon satisfactory completion of the physical examination, the Company hires the applicant. The Memorandum requires that the list of part-timers "will be comprised of 50 percent [Respondent] nominated and 50 percent [Company] nominated individuals."

The Memorandum also assigns the responsibility for calling the part-timers to work in the North Side mailroom operations. The Company formulates and updates the part-time list and provides it to the Respondent. The Memorandum directs the Respondent to maintain the list of part-timers and to "call in to work such number of part-timers on a rotation basis from the list as may be required by the [Company]." The memorandum provides that if the Company determines that the Respondent has abused the call in system, the Company may so inform the Respondent. The Respondent shall have 2 weeks to correct the abuse. If the Union does not correct the abuse within that period, the Company has the right to displace the Union and assume responsibility for calling in the part-timers.

Once per week, the Company's mailing room superintendent gives an updated call-in list to one of the Respondent's elected representatives, such as the chairman, or the assistant chairman of the mailing room, who is also a company employee. A mailroom employee may also receive the call-in list on occasion, when an elected representative of the Respondent is not available. The recipient of the call-in list uses it, on instructions from the mailing room superintendent, to schedule part-timers for work.

When issued to the caller, the call-in list shows the part-timers' names, phone numbers, and social security numbers. The caller, on instructions from the Company, will note on the list the shifts for which the part-timers are needed. The caller will also write in the time of each call, and check the appropriate space on the call-in list, showing the response to each call. The caller starts at the top of the call-in list, and calls each person listed until the required number of part-timers have agreed to come to work on the designated shift. On the next occasion, the caller will fill the Company's request for part-timers, starting where he had stopped in filling the last request for part-timers. Upon reaching the end of the list, the caller will return to the top of the list and go through it again, until all shifts are filled. The Union performs this task daily, except Sunday. The Company provides a new

<sup>1</sup> The caption of this case was amended at the hearing to reflect the Respondent's name correctly.

<sup>2</sup> The General Counsel's unopposed motion to correct the transcript, dated June 20, 1990, is granted. The errors have been noted and corrected.

call-in list each week. The Union returns completed call-in lists to the Company.

Since August 1, 1989, the Respondent has charged a fee of \$2 to a part-timer, each time he or she has received a call and has worked on a mailroom shift. Payment of this fee is not voluntary.

#### B. Analysis and Conclusions

The Board has recognized that the Act does not permit a union to charge and collect "a daily referral fee as a condition of employment from newly hired mailroom employees who did not gain employment through the referral system of, or through any efforts extended by [the union]." *Typographical Union Local 40 (Detroit Newspaper)*, 192 NLRB 951, 962 (1971). In that case, the Board found that the Union was violating the Act by exacting daily referral fees from individuals who had been hired directly by an employer, without any intervention by the Union. In that case, the Union was calling the individuals to work as casual employees and exacting the fee as a condition of employment.

The facts in the instant case do not differ materially from those in *Detroit Newspaper*. Here, the part-timers have gained employment at the Company without any effort by the Respondent. Other than providing names and phone numbers of applicants for the Company's list of part-timers, the Union plays no part in the hiring process. The Company contacts the applicants, screens them, interviews them, requires that they complete a standard application form, and hires those who meet its requirements. The call-in list results exclusively from the Company's efforts. The Respondent does not assist in this process. It does not provide a referral service to the part-timers. Instead, it acts as a conduit in the process of scheduling part-timers for work in the Company's mailroom. I find therefore, that the Respondent is not entitled to exact any referral fee from the part-timers.

Guided by the Board's policy as expressed in *Detroit Newspaper*, I find that since August 1, 1989, the Respondent has exacted a referral fee from part-time employees, to which it was not entitled, as a condition of obtaining shift assignments in the Company's mailroom. By this conduct, the Respondent has coerced employees in the exercise of their right under Section 7 of the Act to refrain from assisting a labor organization. Accordingly, I further find that by this coercive conduct, the Respondent has violated Section 8(b)(1)(A) of the Act. *Teamsters Local 667 (Spector Freight System)*, 248 NLRB 260, 262 (1980), enf'd. 654 F.2d 254 (6th Cir. 1981).

#### CONCLUSIONS OF LAW

1. By collecting a referral fee as a condition of employment from part-time mailroom employees of the Company, who did not gain employment through Respondent's efforts, the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated the Act by charging and collecting referral fees from part-time mailroom employees of the Company, who did not gain employment through Respondent's efforts, I will recommend that Respondent refund to those employees all the fees collected from each of them plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]